

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRI FISHER)	
Claimant)	
VS.)	
)	
SOUTHWEST MEDICAL CENTER)	Docket No. 183,236
Respondent)	
AND)	
)	
KHA WORKERS' COMPENSATION FUND, INC.)	
Insurance Carrier)	

ORDER

Respondent appeals from an Award entered by Special Administrative Law Judge Douglas F. Martin on February 29, 1996. The Appeals Board heard oral argument July 23, 1996.

APPEARANCES

Claimant appeared by and through her attorney, Lawrence Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Terry J. Malone of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds that claimant sustained a 25 percent work disability and the Award of the Special Administrative Law Judge should be affirmed.

Claimant injured her low back on June 4, 1993, while attempting to prevent a patient from falling to the floor in the course of her employment at Southwest Medical Center. After a period of conservative treatment by several physicians, claimant was released to return to work with restrictions. The parties have stipulated that claimant has an 8 percent permanent partial impairment of function as a result of her injury.

The principal issue raised by the respondent is whether the Appeals Board should apply the principles of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), to limit claimant's disability to the functional impairment or whether, instead, claimant should be entitled to work disability. Respondent acknowledges that it did not and could not accommodate the restrictions recommended by claimant's treating physician, Dr. C. Reiff Brown. Respondent argues that claimant should, nevertheless, be limited to functional impairment because claimant declined a job offer from Fowler Nursing Home which would have allowed claimant to work three 12-hour shifts at \$10 per hour and chose not to work a full 40 hour week at the job she did accept at Lone Tree Retirement Lodge when, in fact, she could have worked a 40-hour week had she decided to do so.

The Appeals Board agrees with the decision by the Special Administrative Law Judge not to apply the principles of the Foulk case here and does so essentially for the same reasons specified in the Award by the Special Administrative Law Judge. Claimant has acknowledged that she did not accept the job offer at Fowler Nursing Home because of the additional driving distance. The Fowler Nursing Home position would have paid her \$.25 per hour more than the \$9.75 per hour she earned at the position she did accept at Lone Tree Retirement Lodge. She has also indicated that she worked a limited number of hours because of the difficulties she had experienced as a result of her return to work. The Appeals Board finds the testimony in this regard credible. It is substantiated by the decision of claimant's personal physician to take her off work in June of 1995. In summary, the facts do not support the conclusion that claimant deliberately taken herself out of the competitive labor market or rejected a comparable wage job offer which she could perform.

The decision regarding the nature and extent is governed by law as it existed prior to July 1, 1993. The determining factors, therefore, are the affect the injury had on claimant's ability to obtain and retain employment in the open labor market and the affect the injury had on her ability to earn wages. K.S.A. 1992 Supp. 44-510e. The record includes the deposition testimony of Jerry Hardin and Karen Terrill on these two points. The Appeals Board notes that in the reports of both, the loss of wage earning ability compares with the projected post-injury wage to a wage which is less than the stipulated average weekly wage of \$477.12. When adjusted to compare the projected post-injury to the stipulated pre-injury wage, Ms. Terrill's opinion becomes a 6 percent loss and Mr. Hardin's became a 32 percent loss in the ability to earn a comparable wage. By giving equal weight to both opinions, the Appeals Board concludes claimant has a 19 percent reduction in her ability to earn a comparable wage.

Ms. Terrill and Mr. Hardin also each gave opinions regarding the loss of access to jobs in the open labor market. Both did so on the basis of the different restrictions given by Dr. C. Reiff Brown and Dr. Lawrence Blaty. It is Mr. Hardin's opinion that claimant's loss, based upon Dr. Brown's restrictions, was 20 to 25 percent and based upon Dr. Blaty's 35 to 40 percent. Ms. Terrill concludes, based upon Dr. Brown's restrictions, the loss is 10 percent and based upon Dr. Blaty's it is 17 percent. If the Board were to adopt the common practice of giving equal weight to the two vocational experts and then to give equal weight to the two factors of wage loss and labor market access loss, the result would be a work disability slightly less than the 25 percent awarded by the Special Administrative Law Judge. As the Special Administrative Law Judge notes, however, there is some reason to believe that these may slightly understate the loss in view of the persistence of the complaints and problems claimant had in her attempts to continue working. The Appeals Board, therefore, finds that the 25 percent work disability awarded by the Special Administrative Law Judge reasonably assess claimant's loss and affirms that finding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin on February 29, 1996, should be and the same is hereby, affirmed.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Terri Fisher, and against the respondent, Southwest Medical Center, and its insurance carrier, KHA Workers Compensation Fund, Inc., for an accidental injury which occurred June 4, 1993 and based upon an average weekly wage of \$477.12, for 30 weeks of temporary total disability compensation at the rate of \$299 per week or \$8,970, followed by 5.86 weeks of temporary partial compensation in the sum of \$1,734.51 per week and 379.14 weeks at \$79.52 per week or, \$30,149.21 for a 25% permanent partial general body disability, making a total award of \$40,853.72.

As of August 30, 1996, there is due and owing claimant 30 weeks of temporary total disability compensation at the rate of \$299 per week or \$8,970, followed by 5.86 weeks of temporary partial compensation at the rate of \$295.99 per week in the sum of \$1,734.51, plus 133.14 weeks permanent partial compensation at \$79.52 per week in the sum of \$10,587.29 for a total of \$21,291.80 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$19,561.92. is to be paid for 246 weeks at the rate of \$79.52 per week, until fully paid or further order of the Director.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier as follows:

Susan Maier, C.S.R.

Transcript of Hearing on August 23, 1995

\$206.20

Deposition of Randy Jost

\$158.97

Barber and Associates

Deposition of Karen Terrill	\$178.20
Don K. Smith & Associates Deposition of Jerry D.Hardin	\$287.00
Special Administrative Law Judge Fee	\$150.00

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence Gurney, Wichita, KS
Terry J. Malone, Dodge City, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director